

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KITO JUSTUS SALIM LUCKETT,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals Nos. A-11454 & A-11463  
Trial Court Nos. 3AN-10-5774 CR &  
3AN-00-3112 CR

MEMORANDUM OPINION

No. 6334 — May 25, 2016

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Frank A. Pfiffner, Judge.

Appearances: Cynthia L. Strout, Attorney at Law, Anchorage,  
for the Appellant. Diane L. Wendlandt, Assistant Attorney  
General, Office of Criminal Appeals, Anchorage, and Craig W.  
Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,  
Superior Court Judge.\*

Judge SUDDOCK.

Kito Justus Salim Lockett appeals his conviction for third-degree misconduct involving a controlled substance. Probation officers found cocaine in Lockett's apartment during a probation search. At Lockett's jury trial, the superior court

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\* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

allowed the State to introduce evidence of Lockett's probation status. The superior court also permitted the State to offer rebuttal evidence of prior surveillance of the area of Lockett's apartment to disprove Lockett's shifting of blame to his mother. Lockett challenges the admission of this evidence.

We conclude that the superior court did not abuse its discretion. Lockett's probation status provided necessary context, and the surveillance evidence was proper rebuttal evidence. We therefore affirm Lockett's conviction.

### *Background facts*

On May 6, 2010, a probation supervisor asked the Anchorage Police Department to locate Lockett and to help search his apartment. Lockett was on felony probation for prior drug offenses and was subject to a search condition.

A police officer stopped Lockett at a gas station. The police officer searched Lockett and took two cell phones and cash. Two probation officers then transported Lockett back to his apartment to search it.

Four probation officers conducted the search. In a kitchen cupboard, they discovered a large tin can that had been modified to serve as a "stash" can. The bottom of this can unscrewed to reveal a measuring spoon, small digital scale, prescription pill bottle with Lockett's mother's name on it that had white powder and a smaller baggie inside, and a package of cocaine the size of a golf ball. They also found seven bags of cocaine in the freezer and ten thousand dollars in cash in a shoe box in the bedroom shared by Lockett and his girlfriend Haleena Hanson.

Anchorage Police Detective Randy Adair arrived, field tested the substances, and detected the presence of cocaine. He then obtained a search warrant for a more thorough search of the apartment. Several police officers arrived to continue the search with the probation officers. In the bedroom they found evidence of a young

woman living in the apartment, but they found no evidence that Lockett's mother lived there.

Lockett was indicted on one count of third-degree misconduct involving a controlled substance for knowingly possessing cocaine with intent to deliver.<sup>1</sup> A jury convicted Lockett of that charge.

*Proceedings related to the probation evidence*

Before Lockett's trial, the State filed a notice that it intended to introduce evidence that Lockett was on felony probation, that he was subject to search conditions, and that his house was searched by probation officers. The State said it did not intend to reveal the nature of the prior crime for which Lockett was on probation. Rather, the State's purpose was to explain to the jury why the authorities had searched the apartment. Lockett objected that the evidence was more prejudicial than probative, citing Alaska Evidence Rule 403. But he did not offer to stipulate that the search of the apartment was legal.

Superior Court Judge Frank A. Pfiffner ruled that the State's proposed evidence was admissible background information. He explained that excluding the evidence would leave the probation officers unable to describe their employment to the jury or to explain their participation in the search. To mitigate the potential prejudice of this evidence, the judge read the following limiting instruction to the jury:

You have heard evidence in this case that the defendant was on probation. Such evidence was presented for the limited purpose of explaining why he was contacted on May 6, 2010, and the circumstances surrounding the search in his case. You may not use the fact that Mr. Lockett was on probation for any other purpose.

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<sup>1</sup> AS 11.71.030(a)(1).

The judge also granted a request by Lockett's attorney that this instruction be given both before opening statements and at the close of evidence.

In its closing argument, the State argued that Lockett used the stash can and shoe box to conceal items from his probation officer. The State also noted that Lockett had listed the apartment as his residence on probation documents.

Lockett's defense at trial was that, although he lived in the apartment, the cocaine belonged to his mother — who he claimed also lived there — and he was unaware of the presence of the cocaine.

*Why the court did not abuse its discretion by admitting evidence that Lockett was on probation*

Lockett argues on appeal that the judge abused his discretion by admitting evidence that Lockett was on probation at the time of the search. But the judge concluded that excluding the evidence would deprive the jury of a coherent explanation of the events and would require the testifying probation officers to conceal their occupations. The four probation officers were integral to the discovery of the drugs and other incriminating evidence, and at trial they explained the locations of the seized evidence. The judge thus acted reasonably when he found that the evidence was admissible under Alaska Evidence Rule 404(b)(1) for a non-propensity purpose, and when he concluded that, coupled with the limiting instruction, the evidence was more probative than prejudicial.<sup>2</sup>

We find that the judge did not abuse his discretion.

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<sup>2</sup> See *McIntire v. State*, 1999 WL 34000733, at \*4-5 (Alaska App. Oct. 13, 1999) (unpublished) (affirming trial court's admission of probation evidence to explain why the police and probation officers searched a probationer's residence, finding drugs, and to establish that the defendant lived at the residence where the drugs were found).

*Proceedings related to the surveillance evidence*

Luckett's girlfriend Haleena Hanson testified that Luckett's mother lived with them in May 2010 and that his mother had questionable character and a long history of substance abuse. She testified that his mother was always at the house and frequently had guests. Hanson further testified that a close friend died in late February, and she and Luckett lived with the friend's widow for two or three weeks; then through March and April the two took turns staying with the widow. Luckett's attorney asked, "So it sounds like during that time you weren't spending a lot of time at your own place?" Hanson responded that they were not.

After the defense rested, the prosecutor requested permission to recall Detective Adair to rebut Hanson's testimony about the apartment's occupancy. Adair was a vice detective who earlier in the trial had been qualified as an expert on drug distribution. Prior to Luckett's arrest, Adair had surveilled Luckett's apartment as part of an unrelated investigation. According to the prosecutor, Detective Adair would testify that, during the surveillance periods, Luckett was almost always present at the apartment, Hanson was there occasionally, and Luckett's mother was never there.

Luckett's attorney argued that evidence of this surveillance would be highly prejudicial, and the attorney offered to stipulate "that Mr. Luckett was there much of the time." But the judge ruled that the defense had opened the door to Detective Adair's rebuttal testimony — especially to Adair's assertion that Luckett's mother was nowhere to be seen during the surveillance of the apartment.

*Why the court did not abuse its discretion by admitting the rebuttal testimony*

Luckett argues that the judge abused his discretion in allowing this rebuttal testimony. Luckett reasons that because the jury had been told that Detective Adair

investigated drug trafficking, it would infer that Lockett must have been a narcotics trafficking suspect.

But once Lockett implicated his mother as the culprit and minimized his own presence in his apartment, he opened the door to the State's rebuttal evidence, which was highly probative as to those issues.<sup>3</sup> And Lockett's proposed stipulation was not a viable accommodation, for it did not account for his mother's total absence from the scene during the surveillance periods. The judge could reasonably conclude that the probative force of the evidence outweighed its potential for unfair prejudice. Furthermore, the judge limited the possible prejudice by prohibiting Detective Adair from testifying about why he surveilled the neighborhood of the apartment. We find no error.

### *Conclusion*

We AFFIRM the judgment of the superior court.

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<sup>3</sup> See *Worthy v. State*, 999 P.2d 771, 774-75 (Alaska 2000) (holding that if a party makes otherwise irrelevant evidence a central part of the case, that party has opened the door to extrinsic evidence offered to contradict it).